

FACTUAL HISTORY

On May 10, 2011 appellant, then a 65-year-old former welder, filed a claim (Form CA-2) for binaural hearing loss. He indicated that he first realized his condition was employment related on March 15, 1987. Appellant voluntarily retired from the employing establishment effective December 31, 1999. He reportedly did not advise the employing establishment of the claimed hearing loss until May 10, 2011.

OWCP received the results of various audiograms dating back to August 1973. The audiograms were administered by the employing establishment as part of its hearing conservation program. The most recent employer-administered audiogram was dated November 15, 1999; approximately six weeks prior to appellant's retirement. Appellant also submitted an August 2, 2010 audiogram that was interpreted as demonstrating mild to moderate bilateral hearing loss.

By decision dated November 4, 2011, OWCP denied appellant's claim as untimely filed. While appellant was reportedly aware of his condition in March 1987, he did not file his hearing loss claim until May 10, 2011, which was more than a decade after his last exposure in December 1999.³ The decision noted that OWCP had received only a diagnostic report of 2010 and appellant's statement of 2011. It did not address the hearing conservation material.

On November 14, 2011 appellant's counsel filed a request for reconsideration. He resubmitted copies of various employer-administered audiograms. Counsel argued that the audiograms reflected the existence of a hearing conservation program such that the employing establishment had actual knowledge of a work-related hearing loss.

In a decision dated March 23, 2012, OWCP denied appellant's request for reconsideration. The claims examiner noted counsel's argument that the audiograms demonstrated that the employing establishment had "actual knowledge of a work-related hearing loss." However, in denying the request for reconsideration, OWCP explained that there was no accompanying medical narrative "providing any explanation of causation."

LEGAL PRECEDENT

OWCP has the discretion to reopen a case for review on the merits.⁴ An application for reconsideration, including all supporting documents, must set forth arguments and contain

³ An original claim for compensation for disability or death must be filed within three years after the injury or death. 5 U.S.C. § 8122(a). A claim filed outside this time frame must be disallowed unless the immediate superior had actual knowledge of the injury or death within 30 days. 5 U.S.C. § 8122 (a)(1). In a case of latent disability, the time for filing a claim does not begin to run until the employee has a compensable disability and is aware or by the exercise of reasonable diligence should have been aware of the causal relationship of the compensable disability to his employment. 5 U.S.C. § 8122(b). An employee with actual or constructive knowledge of his employment-related condition, who continues to be exposed to injurious working conditions, must file a claim within three years of the date of last exposure to the implicated conditions. *E.g., James A. Sheppard*, 55 ECAB 515, 518 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993).

⁴ 5 U.S.C. § 8128(a).

evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵ When an application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

On reconsideration, appellant's counsel resubmitted various employer-administered audiograms and argued that these audiograms reflected the existence of a hearing conservation program which demonstrated that the employing establishment had actual knowledge of a work-related hearing loss. A positive test result from an employing establishment program of regular audiometric examinations is sufficient to establish knowledge of a hearing loss so as to put the immediate supervisor on notice of an on-the-job injury.⁷

While the employer-administered audiograms were made part of the record, OWCP's November 4, 2011 merit decision did not address this evidence. On reconsideration, OWCP's examiner listed counsel's argument but stated that there was "no narrative providing any explanation of causation." The claims examiner's focus on "causation" was premature and misplaced. The FECA Procedure Manual provides that, if the employing establishment gave regular physical examinations which might have detected signs of illness (*i.e.*, regular x-rays or hearing tests), the agency should be asked whether the results of such tests were positive for illness and whether the employee was notified of the results.⁸ OWCP made no such inquiry, but instead addressed causation rather than timeliness of the claim. Counsel submitted evidence not previously considered in OWCP's merit decision.

The relevant issue on reconsideration was timely notification of an on-the-job injury. Both the evidence and argument submitted on reconsideration were relevant to that particular issue. Because OWCP did not address the employer-sponsored hearing conservation program or audiometric data, counsel's argument on reconsideration was sufficient to warrant further merit review. The Board finds that the November 14, 2011 request for reconsideration advanced a relevant legal argument not previously considered by OWCP. Consequently, appellant is entitled to further merit review pursuant to 20 C.F.R. § 10.606(b)(2)(ii).

CONCLUSION

The Board finds that OWCP improperly denied merit review under 5 U.S.C. § 8128(a). Accordingly, the case shall be remanded to OWCP for further merit review.

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b).

⁷ See *James A. Sheppard*, *supra* note 3; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6c (March 1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6c (March 1993).

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2012 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further merit review consistent with this decision of the Board.

Issued: November 21, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board